

>>> "Terry R Bacon" <trbacon@varnumlaw.com> 2/28/2007 9:06:45 AM >>>
To: Clerk of the Supreme Court
Re: 2006-39; Amendment to MRPC 1.10; Comment

I support the amendment that was adopted effective November 14, 2006, and appreciate the promptness with which the Court acted last year to address a problem created by the opinion mentioned in the Staff Comment. I have two suggestions, however, with respect to a final rule.

I hesitate to make the suggestions because the suggestions do not relate to the reason for the change adopted in this administrative proceeding. Neither of my suggested changes are intended to reflect substantive changes in the rule. Both are intended to remove incongruities that were created by reason of the 1990 amendment, incongruities that might lead to misinterpretation or confusion.

First (and more important), there is a glaring "error" in the rule as it has been written (since 1990) and as it remains written in the adopted amendment. The error is found in the opening sentence in 1.10(a), which states:

"While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a) or (c), or 2.2." (Emphasis added.) In fact, nothing in Rule 1.9(c) speaks to prohibiting a lawyer from representing a client! Rule 1.9(c) addresses a duty not to use or reveal information; it does not permit or prohibit representations.

It could be argued that there is little harm in leaving the reference to 1.9(c), because the reference should have no effect. That is, because 1.9(c) does not prohibit a lawyer from engaging in a particular representation, the mention of 1.9(c) will not cause an imputed disqualification either. Nevertheless, leaving the reference to 1.9(c) in the rule could be an invitation to find in Rule 1.9(c) a prohibition on representation, despite the rule containing no such prohibition on representation.

Please note that the restrictions in Rule 1.9(c) can cause another rule to prohibit a representation. Thus, the inability to use or reveal confidential information may preclude a lawyer, by reason of Rule 1.7(b), from undertaking a representation, because the inability to use or reveal the information may adversely affect the contemplated representation. But that is not a representation prohibited by Rule 1.9(c). The representation is prohibited by Rule 1.7(b), and 1.10(a) already references a representation prohibited by Rule 1.7.

I have been unable to locate anything that explains why the reference to 1.9(c) was added to 1.10(a) in the 1990 amendment. There was, however, considerable shuffling of rule language and comments between rule 1.10 and 1.9 in connection with that amendment. I am left to conclude that the insertion may have been based on some preliminary drafting changes that were later abandoned, or it was an afterthought, based on a misunderstanding as to what was being done and how the two rules would finally read. If the reference was ever thought to have some meaning, that meaning has been lost.

Therefore, I suggest that the amended rule 1.10 remain in effect except that the "or (c)" be deleted from the first sentence.

Second, there is another plain error in the last paragraph of the existing Comment to Rule 1.10, which comment purports to describe the operation of "Rule 1.10(b)" when it actually describes the operation of Rule 1.10(c). This error arose by reason of the 1990 amendment and the difference between the ABA rule and Michigan's rule. The comment appears to have been taken from the comment to the amended ABA rule. The ABA, however, eliminated its previous 1.10(b) and changed what was 1.10(c) to 1.10(b). Thus, in the amended ABA rule, 1.10(b) became

the part of the rule that addressed this situation of imputed disqualification of the law firm from which a lawyer had left. Michigan's rule, however, did not eliminate the prior 1.10(b) (it merely changed some language in that part), so that the situation addressed by this part of the comment remained in 1.10(c).

Although the Comment is not authoritative, I suggest that the final approval of the recently amended Rule 1.10 be used as an opportunity to cure this additional long existing error in the last paragraph of the Comment.

Terrance R. Bacon
P25127
trbacon@varnumlaw.com